IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945

No. .....

JOSEF ROSENBERG and SAMUEL FREIER,

*Petitioners,*

—against—

UNITED STATES OF AMERICA.

## BRIEF IN SUPPORT OF PETITION

### Statutes Involved

The Federal statutes involved are Title 50 U. S. C. Appendix 701 and the amendments thereto (Act of July 2nd, 1940, Chapter 508, Sec. 6, 54 Stat. 714; Act of June 30, 1942, Chapter 461, Sec. 6, 56 Stat. 463); Title 18 U. S. C. 88; Title I Section 29 prior to its amendment on March 22, 1944 (58 Stat. 118).

### Statement of Facts

### The Indictment

The substance of the indictment has been set forth under "Statement of Matter Involved", *supra.* It is printed in the record at pages 11, 22.

## The Evidence

Testimony adduced on behalf of the Government placed the petitioners Rosenberg and Freier, co-conspirators Hersh Neumann and Abe Neumann and Arnold Weisz (none of whom were under indictment herein), and Koppel (co-defendant who pleaded guilty), all in the roles of partners in the series of three shipments of platinum to Lisbon, Portugal, by steamboat, in the custody of members of the crew (43, 52, 53, 70, 83, 92, 115). These shipments were made in March, April and May of 1941. Later in May, a fourth shipment was made in like manner, but Arnold Weisz was not included in the partnership, although petitioner Freier later sold his interest therein to him (120, 522).

Following the first shipment, these partners decided to make a shipment of platinum, to take advantage of the higher price obtainable for platinum in Canada (56, 790). Irene Weisz, a sister of Arnold Weisz, took platinum purchased with funds contributed by the six partners, to her brother, Ernest Weiss who, himself, carried the platinum to Canada, but at the last moment failed to dispose of the platinum, lest he be exposed, and returned the precious metal to New York (495, 794 and 70). This platinum became part of a subsequent shipment by steamboat to Portugal.

Arnold Weisz, in May, 1941, embarked on a private platinum exportation venture of his own, the shipment of platinum by Transatlantic Clipper. There was no evidence that Arnold Weisz' partners in the steamboat shipments had any knowledge of his exportation of platinum by Clipper (166-170). It appears that Arnold Weisz had no partners in his enterprise of air transport of platinum, but himself financed the transactions. Arnold Weisz employed

a set of co-conspirators who played no part in the partnership ventures, namely, one Felsenberg (964) to purchase platinum for him, and Flight Stewards Mezenen (969) and Mario (971-2) to transport the platinum. The petitioners at the trial steadfastly denied their guilt.

A statement of the testimony relating to petitioner Eisler appears under V, *infra*.

## ARGUMENT

### I

**The statute upon which the indictment is based represents an unconstitutional delegation of legislative power.**

Section 6 of the Act of July 2nd, 1940, empowered, but did not require, the President to prohibit or curtail exportation of military articles, etc., "whenever [he] determines it is necessary". The statute and the offense must be considered in the light of the Court's ruling that the alleged conspiracy ended July 10th, 1941 (144-145), five months before the declaration of war.

It is our position that a grant of power to the Executive by the Legislature, to qualify for constitutionality, must require and direct the Executive to maintain a given course of action, if not absolutely, at least upon specified contingency, determined under standards formulated by Congress. The Executive's finding that such requisite condition or state of affairs exist may by appropriate legislative mandate constitute the contingency requisite to activate the enactment. The making of the finding may be left to the discretion of the executive, but residual uncontrolled option to activate a statute or to leave it inoperative, may not constitutionally be delegated.

Under Section 6 of the statute here involved, there were no declared legislative circumstances under which the President was required to prohibit or curtail any exports. He was permitted to fix the policy and the standard. He was merely contingently authorized to act. He was not directed or required to do anything. Under existing authority (*Field* v. *Clark*, 143 U. S. 649, 693;* *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 415; and *Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495, 541), the failure to compel action under stated circumstances rendered the delegation of power legislative, and hence unconstitutional.

The full Circuit Court held that "the delegation of authority may be upheld on * * * the ground * * * of the traditional dominance of the Executive in the conduct of foreign affairs" relying on *U. S.* v. *Curtiss-Wright Export Corporation*, 299 U. S. 304, 322 as authority. Judges Swan and Clark further upheld the constitutionality of the delegation of power upon the theory that the statute defined the policy, but left "the time and detail of its execution" to the President. Judge Chase did not join in the second ground (1632).

We urge that both grounds are untenable.

## A

### The statute herein is not an enactment in the field of foreign affairs within the meaning of the term in the law of delegation of legislative power.

The line of demarkation between external affairs and internal affairs was clearly drawn by this Court in the course of its opinion in *United States* v. *Curtiss-Wright*

* The Act construed in *Field* v. *Clark* stated "he [the President] shall have the power and *it shall be his duty* * * *" page 680 of 143 U. S. (emphasis ours).

*Export Corp.*, 299 U. S. 304. At page 319, this Court stated, "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. On the basis of this definition the Court noted further (pages 319, 320) "It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the Federal government in the field of international relations • • •."

The regulation of foreign commerce is a duty, power and function which the Constitution expressly confers upon Congress (Article 1, Section 8; *Buttfield* v. *Stranahan*, 192 U. S. 470, 492). Thus, it can hardly be urged that regulation of foreign commerce such as control of exports is intrinsically a field in which "the President alone has the power to speak or listen as a representative of the nation."

Under the Joint Resolution of Congress, considered in the *Curtiss-Wright* case (48 Stat. 811), the President was required to consult and to cooperate with the Governments of American Republics,—to speak and listen as a representative of this nation—thereby providing a situation which combined authority delegated to the President by Congress, with the President's own independent and coordinate authority. Manifestly, it is the consultation and cooperation of the Executive with other nations which constitutes foreign relations, and not control of exportation which was merely the subject matter of the agreement of the consultation and cooperation, just as an infinite number of other matters might be the subject of such foreign relations.

When delegation of power to control exports, or indeed, imports, as in *Field* v. *Clark*, 143 U. S. 649, is referred to as constituting foreign affairs, it is not because such control is itself in the realm of international relations, but because there is involved in the statute delegating power the clear intention that specified reciprocity with foreign governments is the object in view. The entire concept in this class of cases is that the delegation of power to the President by both Houses of Congress, taken together with the Presidential action thereunder, serves as a substitute for what might otherwise be the subject of Presidential agreement with foreign nations, with or without the concurrence of the Senate. See McDougal and Lands, Treaties and Congressional—Executive or Presidential Agreement Interchangeable Instruments of National Policy, 54 Yale L. J. 181, 244-255, cited in the opinion of the Circuit Court at page 1633.

In our case there was no aspect of consultation, cooperation or agreement enjoined upon the President. There was merely unilateral control of exportation.

It may well be that Congress may carve out a specified area of legislation in domestic affairs, including that of specified regulation of foreign commerce and authorize the President to make designated adjustments and modifications in the law, as a matter of national policy in dealings with foreign nations. Once specified items of domestic affairs are thus entrusted to Presidential utilization for negotiation with foreign countries, it may well be that a certain range of discretion must necessarily be delegated to the President, and the entire matter left in terms of such discretion rather than of adamant obligation.

However, before it may be urged that a matter intrinsically domestic is thus entitled to status as an expedient in the field of foreign affairs, the least required to be shown,

is a forthright declaration by Congress that it is making the requisite transfer and conversion of its legislative power into an adjunct of diplomacy.

The language of the joint resolution in *U. S.* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, *supra*, as above noted, contains this forthright offering to the President of prohibition of exportation of designated products to a designated foreign area, for utilization in foreign affairs.

In our case there is no corresponding statement of purpose or intent, and the most that can be gathered from the text of Section 6 and the Title of the Act ("An Act to expedite the strengthening of the National Defense") is that it is legislation exclusively in the field of the conservation of military resources.

"National defense" includes all matters directly and reasonably connected with the defense of the nation against its enemies. *Gorin* v. *United States*, 312 U. S. 19, 28-30.

The defense of the United States, the power to declare war, to raise and support armies, to provide a Navy, and to provide for the "common defense" and the general welfare are powers *expressly* given to the Congress under Article 1, Section 8 of the Constitution.

That Congress has exclusive power to enact legislation in aid of the "national defense" cannot be questioned. "The common defense was one of the purposes for which the people ordained and established the constitution. It empowers Congress to provide for such defense, to declare war, to raise and support armies, to maintain a navy * * *." (*United States* v. *Schwimmer*, 279 U. S. 644, 650.)

The fact that the United States is but one nation in a world composed of many nations, necessarily impinges upon and influences our domestic legislation, including, of course, national defense. This, however, does not convert all of our domestic affairs wholesale into foreign affairs.

Military legislation is particularly influenced by worldwide conditions. Nevertheless, it has never been held, nor has anyone even claimed that the regulation of our Army and Navy are matters of external affairs within the contemplation of the theory of the delegation of legislative power.

Since National Defense is intrinsically a domestic concern within the enumerated powers of Congress, reference to it does not bridge the gap between domestic and foreign affairs, nor, accomplish the act of conversion and transfer required before regulation of foreign commerce can be deemed to have been changed into a foreign affair. Thus, the Act remains as an un-constitutional delegation of legislative power over a domestic affair.

Since the statute in our case does not compel Presidential action, under standards formulated by Congress, it falls short of the standard required in *Buttfield* v. *Stranahan*, 192 U. S. 470, and *Hampton* v. *U. S.*, 276 U. S. 394.

## B

**The statute herein did not merely lodge with the president "the time and detail of execution" but invested him with plenary authority to decide whether under any circumstances exportation would be prohibited or curtailed.**

The difference between mere grant of authority in a delegation of power on the one hand, and the imposition of duty and direction is too broad and well marked in the decisions, for the enactment herein to be properly characterized as bestowing on the President only the right to choose "the time and detail of its execution." The entire rationale of the opinion in the *Curtiss-Wright* case and that of *Field* v. *Clark* would be meaningless and incoherent, were the grant of authority to be deemed synonymous with

the imposition of duty and direction. Certainly there is no suggestion in the *Curtiss-Wright* opinion that the authorization vested in the President by the statute therein left only time and detail of execution to the President. On the contrary, the discretion and option permitted the President in statutes merely authorizing his action is well recognized, and the entire discussion of the case pivots on that fact.

The cases cited by the Circuit Court in support of the text that only the time and detail of execution were left to the executive do not bear out the Court's point. Thus the Court cites *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 216. In the statute under review in that case, however, the Commission was directed to act. Such action was not merely permissive. (See pp. 214, 215, of 319 U. S.) In *United States* v. *Von Clemm,* 136 F. (2d) 968, 970, the Presidential order was sustained on the ground that a subsequent Act of Congress had confirmed and approved that order. *Hirabayashi* v. *U. S.,* 320 U. S. 81, is distinctly war legislation.

## II

**The presidential proclamation (No. 2413) of prohibition of exportation under Section 6, did not comply with the conditions annexed by Congress to the authorization of such proclamation, and hence, the proclamation is invalid.**

### A

Section 6 provided that the presidential proclamation to control exportations should set up rules and regulations. The creation of such rules and regulations were a necessary condition attached by Congress to the grant of power.

"Rules and regulations in a legal sense means laws." (*Higby* v. *Higby*, 4 Utah 19, 26; 5 P. 693, 694). Indeed, the language "rules and regulations" appear in the Constitution (Article 4, Section 3).

In *State Racing Commission* v. *Latonia Agricultural Association*, 136 Ky. 173, 123 S. W. 681, the Court defines "rules and regulations" (p. 187) and distinguishes between statutes which provide for the setting up of rules and regulations and those which omit the requirement permitting action under the general purposes of the Act (pp. 190-191). As the Kentucky Court said at page 187, *supra*:

> "'Rules and regulations' as the term is employed in the statute, implies uniformity, publicity, and the establishment of standards by which applicants or licensees may know in advance upon what conditions the license may be granted, or will be withheld or revoked. The outline suggested is not because of the discretion vested in the board, but because the statute requires that there be rules and regulations."

Without waiver of the claims made under I herein, we earnestly contend that the alleged rules and regulations set up by the president were not, in law or fact, sufficient to meet the legal requirements. Although the presidential proclamation purports to subject the entire subject of the control of these exports to rule and regulation, recourse to the proclamation itself establishes the contrary.

At Volume 5, Federal Register (1940) page 2468, the proclamation states:

> "And I do hereby empower the Secretary of State to issue licenses authorizing the exportation of any of the said articles and materials the exportation of which is not already subjected to the requirement that

> a license be obtained from the Secretary of State authorizing their exportation *and I do hereby authorize and enjoin him to issue or refuse to issue licenses authorizing the exportation of any of the articles or materials listed above in accordance with the aforesaid rules and regulations* or such specific directives as may be from time to time, communicated to him by the Administrator of Export Control." (Emphasis supplied.)

However, when we examine the so-called rules and regulations, we find that they fail to come up to the standard laid down in the existing cases, in that there is no provision for uniform standards by which an application may be appraised by the Secretary of State, and by which an applicant or the public generally might know the objective conditions upon which an application would be granted or denied. The purported "regulations" as they appear in the Federal Register, Volume 5, page 2469, prescribe only forms for applications (Sections 1 and 2) and we search in vain for substantive specifications which the Secretary of State is to consult and by the terms of which he is to appraise an application. We find only this (p. 2469 Federal Register Vol. 5—1940).

> "3. The Secretary of State will issue export licenses to authorize proposed shipments of said articles and materials to applicants who have duly filled out the appropriate form when I have determined that the proposed exportation would not be detrimental to the interests of the national defense."

The statutory provision that the officer to whom power is delegated, shall prescribe rules and regulations for his actions, sets up a requirement of more than mere exercise

of discretion under the general purposes of the Act, in order to validate the action of the executive officer. In this case rules and regulations in the cited text attempt to rise above their source, and arbitrarily state that the exercise of discretion within the general purpose of the Act shall itself, be the requisite rule and regulation. This, of course, is untenable. If a distinction between action pursuant to rule and regulation, and action subject only to discretion under the general purposes of law in fact does exist, such distinction cannot be obliterated by administrative fiat. (*State Racing Commission* v. *Latonia Agricultural Association*, 136 Ky. 173, 123 S. W. 681, *supra.*)

*United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, is an example of the type of delegation of power by legislative grant in which no requirement that executive decision be exercised pursuant to rule and regulation was imposed by Congress. The joint Resolution empowered the President to make "limitations and exceptions" (p. 312) to his order of prohibition. Hence, the issuance or non-issuance of licenses was not subject to appraisal under criteria set up by rule and regulation.

Indeed, generally in cases in which the President has been empowered to embargo or to lift existing enacted embargoes or otherwise to regulate exportation as an expedient of diplomacy (see abstracts of such legislation, in *Curtiss-Wright* opinion), decision pursuant to rule and regulation is not enjoined upon the President. The criteria explicitly set up is generally put broadly, as in the nature of specified reciprocity by our government to specified action or conduct on the part of a foreign government, without further qualification that rules and regulations be set up to govern Presidential action.

On June 30, 1942, the Chief, Export Control Branch, Office of Exports, of the Board of Economic Warfare, pursuant to sub-delegation of powers to him (in accordance

with the provisions of section 6(c) of the Act of June 30, 1942, Chap. 461, 56 Stat. 463), issued rules and regulations relating to control of Exportation. These rules and regulations cover pages 4952 to 5019 of the July 2, 1942 issue of the Federal Register.

These comprehensive rules and regulations go a long way toward supplying the hitherto missing elements of publicity, uniformity and advance knowledge of specifications, in the administration of export control, which are necessary to qualify such administration as being subject to rule and regulation.

The new rules and regulations highlight the failings of the old and demonstrate that the administration of export control had not been hitherto subject to rule and regulation in the accepted and general meaning of this familiar phrase, but had represented uncontrolled judgment of minor administrative officials in the exercise of their discretion under the general purposes of the statute.

There is set up in the new regulation a pattern of division into classifications of the articles and merchandise which require licenses for exportation and corresponding division into classifications of country of consignment. The public is informed that certain licenses are obtainable as a matter of course. Certain classifications of articles and merchandise are rendered exportable to designated classification of places of destination, by general license which is issued to the public without application. Other groupings of articles are exportable under general license provided a shipment does not exceed specified maximum values.

For example, the public is put on notice that application for licenses to export specified merchandise to Portugal will not be considered unless appropriate authorities in London have issued a blockade control permit (p. 5015, [sec. 805.5] Fed. Reg. July 2, 1942).

It is not suggested that the classifications of articles, value, and countries of destination made in the rules and regulations of the Board of Economic Warfare on June 30, 1942, when the country was at war, would be logical, in July 1940. The point urged, however, is that administration of export control in July 1940, if not entirely haphazard and chaotic, which condition is certainly not to be presumed, necessarily required administrative officials to devise a plan and scheme of classifications of exportable merchandise, by kind and value of shipment, and possibly by place of destination. These classifications must have existed *off the record*. The statute, fairly read, it is urged, required that they be given official publicity, thereby facilitating regularity and uniformity in treatment of applications, and rendering favoritism or discrimination among applicants readily susceptible to detection and exposure. To require control subject to rule and regulation is tantamount to requiring the setting of uniform standards of control. (See *Butfield* v. *Stranahan*, 192 U. S. 470, *supra; In Re Kollock*, 165 U. S. 526.)

This Court very recently had occasion to hold that administrative rule and regulation promulgated pursuant to law might not be disregarded by the agency whose procedure and function they were designed to govern. (*Bridges* v. *Wixon*, decided June 18, 1945, Law. Ed. Vol. 89, page 1489, at 1498.)

This recognition of the authoritative status of administrative rule and regulation promulgated pursuant to statute, underscores the essentiality of executive observance of the legislative mandate that rules and regulations, at the outset, be prescribed by an administrative office for its own guidance and control. Certainly, the administrative agency could not disregard the legislative mandate and entirely omit setting up the requisite rules and regulations. By a parity of reasoning, it is submitted, the administrative

agency may not set up matter which is denominated as "rules and regulations" but which fall definitely short of fulfilling the function of rules and regulation, or of qualifying as such as a matter of definition, by failing to set up reasonable specifications designed to assure regularity, uniformity and publicity.

**B**

It is well settled law that the violation of a legislative order of an executive officer can be punished as a crime only if the order complies with the requirements, conditions and qualifications attached to the grant of the delegation of power.

In *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 432, this Court said: "If the citizen is to be punished for the crime of violating a legislative order of an executive officer or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission." Again in *Mahler* v. *Eby,* 264 U. S. 32, 44, the Court states: "It is essential that, where an executive is exercising delegated legislative power, he should substantially comply with all the statutory requirements in its exercise and that, if his making a finding is a condition precedent to this act, the fulfillment of that condition should appear in the record of the act."

In the cited case the Court quotes from its decision in *Wichita R. R. & Light Co.* v. *Public Service Commission,* 260 U. S. 48, 59, including the following: "It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action."

In our case, we respectfully submit that the Presidential order failed to comply with the Congressional condition and qualification that prohibition of exportation be subjected to

rule and regulation, and hence, is invalid under the rule of the cases cited.

## III

**The prosecution of petitioners after June 30, 1942 (the expiration or repeal of the temporary statute) was barred, and their conviction must be reversed.**

The Act of July 2, 1940, was a temporary statute. By its terms, it expired on June 30, 1942, unless Congress "shall otherwise provide." At common law, prosecutions for violation of a temporary statute could not be maintained subsequent to its expiration. (*The Irresistible,* 20 U. S. 551.)

Petitioners urge that no change was made by statute permitting prosecution after the expiration of a temporary statute until the recent amendment of Title 1, U. S. C., Sec. 29, on March 29, 1944, almost eighteen months after this conviction was had. Certainly this amendment was not retroactive and could have no legal effect to validate that which was invalid. Thus, the trial of the petitioners in September and October of 1942 was illegal, and their conviction cannot be permitted to stand. In connection with the amendment of March 22, 1944, Title 1, U. S. C., Sec. 29, the Court's attention is respectfully referred to Senate Committee Report No. 734, 78th Congress, and the letter of the Attorney General dated July 24, 1942. In this letter the Attorney General recognizes that the then existing statute, Title 1 U. S. C., Sec. 29 did not apply to temporary statutes.

The Circuit Court, however, held that the Act of July 2, 1940, did not expire on June 30, 1942, but by virtue of the Act of June 30, 1942 (Chapter 461, 56 Stat. 463) was extended to June 30, 1944, and that it was therefore unnecessary to consider whether Title 1 U. S. C. Sec. 29 prior to

its aforesaid amendment constituted a savings clause authorizing prosecutions subsequent to the expiration of a temporary statute. (See footnote, p. 1634, C. C. A. opinion.)

Under familiar principles of statutory construction, we contend that the Act of June 30, 1942, is a new and different statute, and that by virtue of its enactment, the earlier Act (July 2, 1940) either expired on June 30, 1942, or was repealed as of that day. The points of contrast between the old and the new statute are so numerous and vital that a mere scheduling of the differences serves to refute the Circuit Court's statement that the new is an extension of the old.

(a) 1940 Act: Enacted while we were at peace, and the preamble defines its purpose as being to expedite the national defense.

1942 Act: Enacted while this country was at war. By its title, its purpose was to further expedite the prosecution of the war.

(b) 1940 Act: Its application was limited to such war equipment or component parts thereof, machinery and tools, as the President might determine it was necessary to the national defense to prohibit or curtail the exportation thereof.

1942 Act: It embraced any and all articles, materials and technical data without regard to their character, destination or relation to the war effort or national defense.

(c) 1940 Act: It required the President to find as a fact that the prohibition of exportation of the listed articles was necessary to national defense.

1942 Act: It required no finding as a condition precedent to the exercise of the power.

(d) 1940 Act: Authority expired on June 30, 1942, unless Congress otherwise provided.

1942 Act: The President's authority is to terminate on June 30, 1944, or upon prior date that Congress or the President might designate.

(e) 1940 Act: Contained no saving clause as to the prosecutions not commenced prior to the date of expiration.

1942 Act: Contains such a saving clause.

In the 1942 statute immediately following the enactment clause, the language appears "That Section 6 of the Act of July 2, 1940 (54 Stat. 714) is hereby amended to read as follows". This language operates to repeal the prior statute. When a statute recites that another "is amended to read as follows", the former is necessarily repealed. (*Roman* v. *Ide,* 107 F. 161, Cert. denied 181 U. S. 619; *Columbia Wire Co.* v. *Boyce,* 104 F. 172; *Heinze* v. *Butte & B. Consol. Min. Co.,* 107 F. 165, Cert. denied 194 U. S. 632.)

Thus, whether it be deemed that the 1940 Act was repealed or whether it expired on June 30, 1942, makes no difference in the result as far as the prosecution of these petitioners after June 30, 1942, is concerned. Our authority for this statement is this Court's reasoning in *The Irresistible,* 20 U. S. 551, and the fact that the savings clause mentioned in cited case is substantially the same as that in the amendment to Title 1, U. S. C. Sec. 29, insofar as the latter's effect on the temporary statute is concerned.

In *The Irresistible,* 20 U. S. 551, a temporary statute was repealed prior to the date of its expiration, and new provisions on the same subject adopted, the new statute providing "that persons having offended against any of the Acts aforesaid may be prosecuted, convicted and punished as if the same were not repealed." This Court held that "the obvious

construction of this clause is, that the power to prosecute, convict and punish offenders against either of the repealed Acts remains as if the repealing Act had never been passed", and the Court went on further to say that "it is well settled, that an offense against a temporary Act cannot be punished after the expiration of the act, unless a particular provision be made by law for that purpose". (*The Irresistible,* 20 U. S. 551, 552.)

No such provision appears in the statute of July 2, 1940. Only in the new statute of June 30, 1942, was there a provision extending the right to prosecute beyond the expiration date.

Returning then to Title 1, U. S. C. Sec. 29, prior to its amendment, we must insist that it be interpreted as this Court interpreted the savings clause in *The Irresistible* case, namely, to leave the matter of prosecution of a temporary statute in status quo, which in our case was the original date of the expiration of the temporary statute —June 30, 1942—as the last day for the maintenance of any prosecution for violation thereof. It follows, therefore, that since these petitioners were not brought to trial until September, 1942, their conviction was illegal.

## IV

**Petitioners were denied a fair trial because of the Trial Court's ruling having the effect of permitting the jury to consider proof of crimes committed by others as proof of petitioners' guilt under this indictment. The opinion of the Circuit Court overrules this Court's decision in *McElroy* v. *United States,* 164 U. S. 76, 81.**

The Circuit Court has misappraised the gravamen of our complaint on this score, as an objection relating to variance. Actually, the disparity between the single conspiracy al-

leged in the indictment and the two conspiracies of which testimony was given, merely precipitated the prejudicial rulings and instructions which intolerably disfigured the lineaments of a fair trial herein.

This Court's decision in *Berger* v. *United States,* 295 U. S. 78, stands as authority for the proposition that the evidence in our case really showed two separate conspiracies with no connection except a common member to both schemes. See also the same case in the Circuit Court of Appeals 73 F. 2d 278; *Tinsley* v. *United States,* 43 F. 2d 890; *Marcante* v. *United States,* 49 F. 2d 156; *Terry* v. *United States,* 7 F. 2d 28; *Wyatt* v. *United States,* 23 F. 2d 791.

## A

This Court has held, in *McElroy* v. *United States* (164 U. S. 76, 81), that several counts involving crimes of the same nature might be joined in the same indictment, but that, however, "joinder cannot be sustained where the parties are not the same and the offenses are in no wise parts of the same transaction and must depend upon evidence of a different set of facts as to each or some of them". (164 U. S., at page 81.) The Circuit Court in our case has held (1637) "Just as in the *Cohen* case [*U. S.* v. *Cohen,* 125 Fed. 2d 82, Cert. denied 323 U. S. 799] all the transactions are crimes of the same kind and could have been joined and pleaded in separate counts, even though the confederates were not the same in all". There is no authority stated for this theory except that created by the 2nd Circuit itself in the cases cited in its own opinion, and *United States* v. *Tuffanelli* (7 C. 131 Fed. 2d 890, 893, 894; Cert. denied 318 U. S. 772). In the *Tuffanelli* case the majority of the Court conceded that such joinder on the part of the prosecuting official was bad practice, but that under the particular circum-

stances of that case they would affirm the judgment of conviction. Whether the latter reason motivated this Court in denying the petition for certiorari, the writer does not know. However, research on the subject discloses no authority in this Court changing or modifying its ruling in the *McElroy* case, *supra*. The Tenth Circuit in *Marcante* v. *U. S.*, 49 Fed. 2d 156; the Ninth Circuit in *Terry* v. *U. S.*, 7 Fed. 2d 28, 30, and the Eighth Circuit in *Coco* v. *U. S.*, 289 Fed. 33, follow this Court's ruling in the *McElroy* case. Thus, it is crystal clear that there is a variance between the Circuits on a basic principal in the administration of criminal law in the Federal Courts. As a matter of fact, the new rules of criminal procedure for the District Courts of the United States cement the principle stated in the *McElroy* case. Under Rule 13 of the new Rules, it is provided that a "Court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants, if there is more than one, could have been joined in a single indictment or information." Rule 14 permits severance where prejudice exists. Certainly this Court ought not to permit the ruling of the Second Circuit to stand, to the effect that crimes could be joined in one count or in one indictment, "even though the confederates were not the same in all" (1637).

Ordinarily this point arises for the first time during the trial. However, in this case, the possibility of prejudice was pointed out to the Trial Court by the demurrer (1578, 1584). It was referred to in the opinion denying the demurrer (1592). It was raised many times at the trial on motions to strike, motions to withdraw a juror and to declare a mistrial, objections to testimony, motions to dismiss and motions to compel an election. (961-2, 965-7, 966, 967, 986, 987, 988, 999, 1035-6, 1052-6, 1057 and 1076; 1124-6. 1127, 1128-9, 1521-2, 1562, 1567.)

**B**

From the foregoing, it appears that the petitioners had apprised the Court that the indictment was but a camouflaged instrument, and that while it pretended to charge only one conspiracy, it was drawn to embrace several separate and distinct offenses. The Court proceeded to instruct the Jury that once a conspiracy was established, the acts and declaration of any conspirator was binding on the others (1549, 5501). There was no limitation by the Court that the acts and declarations of conspirators in one conspiracy could not be used to support a conviction of conspirators in another conspiracy. Thus, our case presents the situation where petitioners may well have been convicted by the jury because of the testimony concerning the incidents at Flushing, when Arnold Weiss, not indicted in this conspiracy, delivered platinum to one Mezenen (969). This Court is respectfully referred to the petition and brief of the petitioners Weiss on this subject. Suffice to say that the Court instructed the jury to the effect that there was only "one charge, one conspiracy" (1562). Specific exception was taken, and the Court was requested to charge the jury to the effect that if there was more than one conspiracy, petitioners should be acquitted (1568—Petitioner Rosenberg's requests, 10 and 14).

The fact remains that on such joint trial of separate conspiracies, it would be considered an incredible enormity, if the Court were to charge that a particular defendant in one conspiracy could be convicted upon testimony inculpating another as a member of another of the conspiracies being tried.

Yet, in our case, the composite effect of the Court's receiving testimony concerning the crimes of others in another conspiracy, as against the petitioners, over their objection and exception and motions to strike out (961, 965, 967, 968,

986, 988, 992, 993, 1023, 1035, 1052, 1057, 1058, 1128, 1129) and then proceeding to make the conventional charge that the acts and declarations of any conspirator binds all (1549, 5501) was to permit conviction of petitioners upon testimony of overt acts in a conspiracy in which they were not involved. Thus a variance which might have been relatively harmless to petitioners, if the proof were confined by the Court to the conspirators involved, was rendered malignant by the refusal of the Court to recognize the existence of the variance and to pattern its instructions and rulings in accordance with the truth as it developed rather than the fiction of the indictment. At any rate, the demonstration that the existence of variance in conjunction with the Court's obliviousness thereto, may lead to consequences of major error, is incidental; the crux of the wrong done petitioners is that they were denied a fair trial when the Trial Court, by its ruling on the admissibility of the extraneous evidence against petitioners bracketed with the conventional conspiracy charge adverted to, held, in inevitable effect, that conviction of petitioners could rest upon testimony concerning crimes in which they were not involved.

## V

## LIMITED TO PETITIONER EISLER.

**The Circuit Court erred in holding that there was sufficient evidence as a matter of law to warrant the submission of the case to the jury as against Eisler.**

In this discussion we shall accept the Circuit Court's statement of the evidence against Eisler (1639, 1640). It is important to note their statement that "possibly somewhat more doubt may exist as to the defendants Friedman and Eisler, but, if so, it was a doubt to be resolved by the Jury".

Our position bluntly stated is that there was no issue for the Jury where Eisler was concerned.

The first item of evidence used by the Circuit Court to sustain their position, was an incident alleged to have occurred in Eisler's office (46-7, 417-424, 1244, 1245). Hersch Neumann, co-defendant and principal conspirator, testified that sometime in March, 1941 (44), a quantity of platinum was purchased. It was brought to his office at 50 Pine Street (45). Eisler had an office on the fifth floor of the same building (46). Hersch Neumann further said that he accompanied Rosenberg to the outside of Eisler's office. Rosenberg entered the office, remained a few minutes. Neumann went inside and saw Eisler and Rosenberg talking together. Later Rosenberg told him that he had given the platinum to Eisler (46, 47). We stop at this point to indicate that Eisler steadfastly denied that Rosenberg ever left any platinum at his office (1245). Incidentally, Rosenberg also denied the incident (1151).

Assuming that Rosenberg did have the platinum in his pocket when he entered Eisler's office, there is no direct proof or circumstances from which an inference can be drawn that Rosenberg left platinum in Eisler's office or, that if he did leave it there, he left it with Eisler. Without this proof, there was no evidence against Eisler to connect him with the conspiracy. The testimony of Hersch Neumann was not sufficient to rise to the dignity of proof in a criminal case. The most that can be said is that it could arouse suspicion but certainly it could not be considered as legal proof sufficient to deprive a man of his liberty.

The Circuit Court said that platinum was later received in Lisbon (1639). The testimony showed that the conspirators sent platinum which arrived at Lisbon but that is not proof that Eisler had anything to do with the shipments. Incidentally, the Circuit Court limited Eisler's connection to the first shipment (1639). The Circuit Court

overlooked the Government testimony that platinum was received at Lisbon through others than Eisler (82, 137-8; 2nd and 4th shipments). Thus the receipt of the first shipment has no probative value to connect Eisler with the conspiracy.

The next statement by the Circuit Court is to the effect that Eisler admitted that he knew the First Officer of the "Concalho Velho". That is true. But, the Circuit Court had no justification for stating that "the Jury could properly infer that Eisler engineered the final stages of the shipment", just because he knew the First Officer. There were undoubtedly many people who knew this First Officer, and there were many ways of Neumann and others contacting him. As a matter of fact, there was no definite proof in the case, that the platinum moved on this particular vessel, and certainly, it was error to say that the Jury could "properly infer" that merely because of Eisler's admission that he knew this First Officer, therefore Eisler was a party to a conspiracy. This is certainly pyramiding inference on inference, which this Court has condemned so frequently, particularly in *United States* v. *Ross* (92 U. S. 281).

The Circuit Court then went on to say that "the complicated nature of the transaction was sufficient in itself to tell him [Eisler] that Rosenberg had not been acting alone", and that therefore, even though the full testimony might not show "Eisler's direct knowledge of the full nature of the scheme and of the participation of other conspirators", that the foregoing, however, was "clearly sufficient to make him a conspirator with the others". This statement is directly contrary to this Court's holding in *U. S.* v. *Falcone*, 311 U. S. 205.

Manifestly, a case made up purely of inference built on inference, is all that was presented as against Eisler. Proof that he may have received any financial reward was abor-

tive, and the Government was unable to establish any such fact.

From the fact that the trial of the case took about four weeks, and that the testimony against Eisler covered but a minute portion of the record, it is easy to see that the mere submission of the case to the Jury against him was sufficient to condemn him in their eyes. Thus, the problem discussed under IV herein is revived, and the practice of using testimony of crimes against others, to support a purely hearsay case against Eisler, stands out in bold relief.

The District Judge ruled that conversations between co-conspirators not in the presence of Eisler could be used to prove that Eisler was a member of the conspiracy. To this, specific exception was taken. We quote from the record:

> "I would like to indicate that all of these conversations, not in the presence of Mr. Eisler are objectionable, and I have made motions to strike them out.
>
> The Court: Overruled. If they prove he is a member of the conspiracy, it is all right; if not, it will be stricken out.
>
> Mr. Plaut: Exception" (47).

The Circuit Court made no finding with respect to this error which was raised. However, it was in the light of the District Court's ruling that the jury made its determination of guilt. That the Court's ruling was error is clear. (*Kuhn* v. *U. S.*, 26 Fed. 2d 463, 464; *U. S.* v. *Renda*, 56 Fed. 2d 601, 602; *U. S.* v. *Nardone*, 106 Fed. 2d 41; *Mayola* v. *U. S.*, 71 Fed. 2d 65; *Minner* v. *U. S.*, 57 Fed. 2d, 506, 511; *Thomas* v. *U. S.*, 57 Fed. 2d, 1039, 1041; and finally in *Glasser* v. *U. S.*, 315 U. S. 60, 74, this Court stated:

> "However such declarations are admissible over the objection of the alleged co-conspirator, who was not

present, only if there is proof aliunde that he is connected with the conspiracy."

As we have already said, there was no proof in the record other than this hearsay testimony against Eisler. Small wonder that the Circuit Court said, as to Eisler, "possibly somewhat more doubt may exist" (1639). If some doubt existed in the mind of the Circuit Court after reading the record, with their years of appellate experience and ability to disregard testimony which in no way affected him, what can be said about a jury of laymen, lacking this experience and ability, being called upon to decide this issue upon such ethereal proof.

"Insufficient evidence," said the Court of Appeals of the State of New York, "is, in the eye of the law, no evidence". *Matter of Case,* 214 N. Y. 199, 203-204; *People* v. *Scharf,* 217 N. Y. 204, 211. "Every inference must stand upon some clear, direct evidence and not upon some other inference or presumption." (*People* v. *Racezizs,* 206 N. Y. 249, 270. See also: *Farmer* v. *U. S.,* 223 Fed. 903, 907; *U. S.* v. *Silva,* 109 Fed. 2, 531.

## CONCLUSION

**The writ of certiorari should be granted.**

Respectfully submitted,

JAMES I. CUFF,
*Attorney for Petitioners.*

HENRY G. SINGER and
HARRY SILVER,
*With him on the brief.*